

**JUDICIAL CONFERENCE OF THE UNITED STATES**

**STATEMENT OF**

**JUDGE DENNIS JACOBS  
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**



**BEFORE**

**THE SUBCOMMITTEE ON COURTS, THE INTERNET,  
AND INTELLECTUAL PROPERTY**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES HOUSE OF REPRESENTATIVES**

**ON**

**THE FEDERAL JUDICIARY: IS THERE A  
NEED FOR ADDITIONAL FEDERAL JUDGES?**

**June 24, 2003**

## SUMMARY OF WRITTEN STATEMENT

Every other year, the Judicial Conference (Conference) conducts a survey of judgeship needs in the U.S. courts of appeals and district courts. Consistent with the result of the latest survey, the Conference is transmitting a draft bill containing recommendations to create 57 additional judgeships, 11 for the U.S. courts of appeals (9 permanent and 2 temporary), and 46 for the U.S. district courts (29 permanent and 17 temporary). For many of the courts, the recommendations reflect needs developed since the last comprehensive judgeship bill was enacted, in 1990. The Conference also recommended that 5 temporary district court judgeships created in 1990 be established as permanent positions.

In developing recommendations for additional judgeships, the Conference uses a formal, systematic and rigorous process. Each court of appeals and district court seeking an additional judgeship submits a detailed justification to the Subcommittee on Judicial Statistics. The Subcommittee reviews and evaluates the request and prepares a preliminary recommendation which is sent to the court and the appropriate circuit judicial council. The response from the court and the recommendation of the judicial council is then reviewed by the Subcommittee in the light of updated caseload data. The Subcommittee then prepares recommendations for the Committee on Judicial Resources. The Committee's recommendations are then provided to the Conference for final approval.

To reduce requests for additional judgeships, the Judiciary has taken steps to maximize use of existing judgeships, including: use of new, more conservative formulas to evaluate judgeship requests in both the courts of appeals and district courts; recommendations that vacancies not be filled in courts with consistently low workload; requesting temporary rather than permanent judgeships; use of senior and magistrate judges; inter-circuit and intra-circuit assignment of judges; use of alternative dispute resolution; and implementation of new technologies such as video-conferencing.

Even with these efforts to deploy judges with maximum effectiveness, current workload needs cannot be met with the current resources. Workload has increased in both district and appellate courts since the last comprehensive judgeship

bill was passed. No additional judgeship has been created for the courts of appeals since 1990; yet filings have grown by 41 percent, and the national average caseload per three-judge panel is 1,090--the highest ever. In this same period, district court filings rose 29 percent. In recent years, 34 additional district judgeships were created to alleviate particular problems in certain districts; even so, the average weighted filings per judgeship rose to 523 in 2003--well above the Conference standard for considering recommendations for additional judgeships. Without assistance from our senior and magistrate judges, the courts could not have managed this caseload.

The Conference does not recommend (or wish) indefinite growth in the number of judges. The *Long Range Plan for the Federal Courts* (in Recommendation 15) recognizes that growth in the judiciary should be carefully controlled so that creation of new judgeships is limited to that number necessary to exercise federal court jurisdiction. The Conference is perennially attempting to balance the need to control growth and the need to seek only the judgeships that are appropriate to the workload.

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Mr. Chairman and members of the Subcommittee, I am Dennis Jacobs, Circuit Judge for the Second Circuit Court of Appeals and Chair of the Judicial Conference Committee on Judicial Resources. That Committee is responsible for all issues of human resource administration, including the need for Article III judges and support staff in the U.S. courts of appeals and district courts. I am here today to provide information about the judgeship needs of the courts and the process by which the Judicial Conference of the United States (the "Conference") ascertains those needs.

Every other year, the Conference conducts a survey of judgeship needs of all U.S. courts of appeals and U.S. district courts. The latest survey was completed in March 2003. Consistent with that survey, the Conference recommended that Congress establish 57 new judgeships in the courts of appeals and district courts. The Conference also recommended that five temporary district court judgeships created in 1990 be established as permanent positions. Appendix 1 contains the particular recommendation as to each court.

For many of the courts, the recommendations reflect needs developed since the last comprehensive judgeship bill was enacted, in 1990. Every two years since then, the Conference has submitted to Congress recommendations on the numbers of additional Article III judgeships required in the judicial system.

### Survey Process

In developing recommendations for consideration by Congress, the Conference (through its committee structure) uses a formal process to review and evaluate Article III judgeship needs. The Committee on Judicial Resources and its Subcommittee on Judicial Statistics manage these reviews; the final recommendations on judgeship needs are adopted by the Conference itself. Before a recommendation is transmitted to Congress, it undergoes consideration and review at six levels within the Third Branch, by: 1) the judges of the court making a request; 2) the Subcommittee on Judicial Statistics; 3) the judicial council of the circuit in which the court is located; 4) the Subcommittee, in a further and final review; 5) the Committee on Judicial Resources; and 6) the Conference. In the course of the 2003 survey, the courts requested 80 additional judgeships,

permanent and temporary. Fifteen new judgeships were created in the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act. Our review procedure reduced the number of judgeships recommended by the Conference to 57.

In the course of each judgeship survey, all recommendations made in the prior survey are re-considered, taking into account the latest workload data, changes in the availability of resources, and adjustments to guidelines for evaluating requests. In some instances, this review prompts adjustments to previous recommendations.

### Judicial Conference Standards

The recommendations developed through the review process described above are based in large part on a numerical standard based on caseload. These standards, provided at Appendix 2, are not in themselves indicative of each court's needs. They represent the caseload at which the Conference may begin to consider requests for additional judgeships - the starting point in the process, not an end point.

Caseload statistics must be considered and weighed with other court-specific information to arrive at a

sound measurement of each court's judgeship needs; circumstances that are unique, transitory, or ambiguous may result in an overstatement or understatement of actual burdens. The Conference process therefore takes into account additional factors, including: the number of senior judges, their ages and level of activity; magistrate judge assistance; geographical factors, such as the number of places of holding court; unusual caseload complexity; temporary or prolonged caseload increases or decreases; use of visiting judges; and any other factors noted by individual courts (or identified by the Statistics Subcommittee) as having an impact on resource needs. Courts requesting additional judgeships are specifically asked about their efforts to make use of all available resources. (See Appendix 3.)

For example, the standard used by the Conference as its starting point in the district courts is 430 weighted filings per judgeship. But in every district court as to which the Conference recommended an additional judgeship in March 2003, the workload is at 489 weighted filings and above. In all but three of those district courts, weighted filings per judgeship exceed 500.

In the courts of appeals, the starting point used by the Conference is 500 adjusted filings per panel. In 2003, four circuits exceeded 900 adjusted filings per panel; even so, two of these courts did not request an additional judgeship. The case mix in the circuits in which additional judgeships are recommended differs significantly from the case mix in the circuit courts that did not request additional judgeships. For example, criminal and prisoner petition appeals were approximately 60 percent of all appeals filed in the Fifth and Eleventh Circuits (which did not seek additional judgeships), but only about 35 percent in the Second and Ninth Circuits (which did). In each circuit court as to which the Conference has recommended additional judgeships, the caseload levels substantially exceed the standard, and other factors bearing on workload have been closely considered.

In short, caseload statistics furnish the threshold for consideration, but the process entails a searching and critical look at the caseloads in light of many other considerations and variables, some of which are subjective and all of which are considered together.





districts, no additional judgeship has been created for the courts of appeals. As a result, the national average caseload per three-judge panel has reached 1,090--the highest ever. Were it not for the assistance provided by senior and visiting judges, the courts of appeals would not have been able to keep pace, particularly in light of the number and length of vacant judgeships.

Even with the additional district judgeships, the number of weighted filings per judgeship in the district courts has reached 523--well above the Judicial Conference standard for considering recommendations for additional judgeships. I have provided at Appendix 4 a more detailed description of the most significant changes in the caseload since 1991.

One important factor bearing on workload in the district courts, which may not be obvious from the caseload data, is the change in the nature of the criminal business. Since 1991, the conviction rate for criminal defendants has grown from 82 percent of all defendants to 90 percent in 2003. Thus even without an increase in the district court caseload, there has been an increase in workload attributable to sentencing. In 2003, there were 70,585 sentencing hearings. This

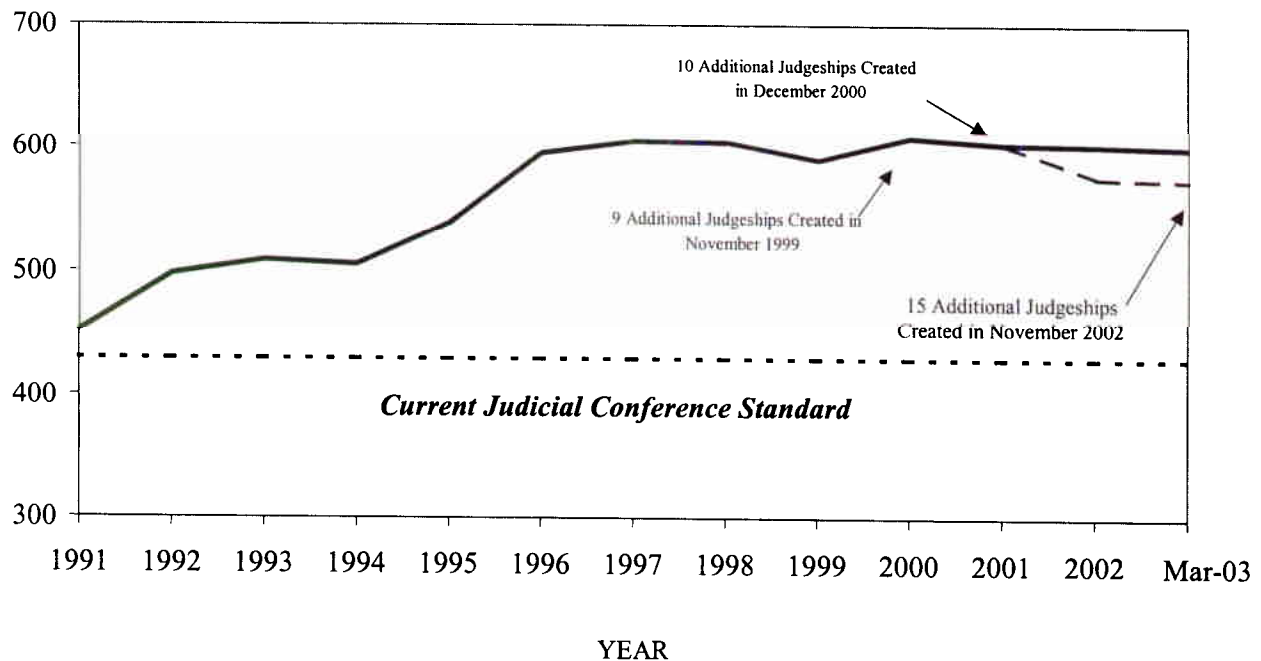


that district court judges conducted approximately 15,000 such hearings in 2003. Again, without the assistance of senior and magistrate judges (and visiting judges), the district courts would not have been able to manage the workload increases.

Although the national figures provide a general indication of system-wide changes, the situation in courts where the Conference has recommended additional judgeships is much more dramatic. For example, there are eight district courts with caseloads exceeding 600 per judgeship. The district courts in which the Conference is recommending additional judgeships (viewed as a group) have seen a growth in weighted filings per judgeship from 453 in 1991 to 600 in March 2003 (or 574 per judgeship taking into account the 34 newly created judgeships)--an increase of 32 percent (Chart 3).

The national data and the combined data for courts requesting additional judgeships provide general information about the changing volume of business in the courts. The Conference's recommendations are not, however, premised on this data concerning courts as a group. Judgeships are authorized court-by-court rather than nationally; so the workload data most relevant to the judgeship recommendations are those that relate to

**CHART 3.**  
**WEIGHTED FILINGS PER JUDGESHIP IN DISTRICTS WITH**  
**RECOMMENDATIONS FOR ADDITIONAL JUDGESHIPS**



each specific court as to which the Conference has recommended an additional judgeship.

Appendix 1 contains summary information about the numbers of additional judgeships recommended by the Conference for each court. The Legislative Affairs staff of the Administrative Office of the U.S. Courts has previously provided to each member of the Judiciary Committee the detailed justifications for the additional judgeships in each court. This material is too voluminous to attach as an appendix to this statement.

Over the last 20 years, the Judicial Conference has developed, adjusted, and refined the process for

evaluating and recommending judgeship needs in response to both judiciary and congressional concerns. The Conference does not recommend (or wish) indefinite growth in the number of judges. The *Long Range Plan for the Federal Courts* (Recommendation 15) recognizes that growth in the judiciary must be carefully limited to the number of new judgeships that are necessary to exercise federal court jurisdiction. However, as long as federal court jurisdiction continues to expand, there must be a sufficient number of judges to properly serve litigants and justice. The Conference is perennially attempting to balance the need to control growth and the need to seek resources that are appropriate to the workload. In an effort to implement that policy, we have requested far fewer judgeships than the caseload increases would suggest are now required.

On behalf of the Judicial Conference, I request that this Subcommittee give full and favorable consideration to the draft bill submitted by the Judicial Conference to establish 11 additional judgeships for the U.S. courts of appeals and 46 additional judgeships for the U.S. district courts.

**TABLE 1. ADDITIONAL JUDGESHIPS OR CONVERSION OF EXISTING JUDGESHIPS RECOMMENDED BY THE JUDICIAL CONFERENCE**  
2003

CIRCUIT/DISTRICT	AUTHORIZED JUDGESHIPS*	JUDICIAL CONFERENCE RECOMMENDATION
<b>U.S. COURTS OF APPEALS</b>		<b>9P, 2T</b>
FIRST	6	1P
SECOND	13	2P
SIXTH	16	1P
NINTH	28	5P, 2T
<b>U.S. DISTRICT COURTS</b>		<b>29P, 17T, 5T/P</b>
ALABAMA, NORTHERN	8	1P
ALABAMA, MIDDLE	3	1P
ARIZONA	13	3P
CALIFORNIA, NORTHERN	14	1P, 1T
CALIFORNIA, EASTERN	7	3P, T/P
CALIFORNIA, CENTRAL	28	1P, 2T
CALIFORNIA, SOUTHERN	13	2P, 3T
COLORADO	7	1T
FLORIDA, MIDDLE	15	2P, 1T
FLORIDA, SOUTHERN	18	4P
HAWAII	4	T/P
IDAHO	2	1T
ILLINOIS, NORTHERN	22	1T
INDIANA, NORTHERN	5	1T
INDIANA, SOUTHERN	5	1T
IOWA, NORTHERN	2	1T
KANSAS	6	T/P
MISSOURI, EASTERN	8	T/P
MISSOURI, WESTERN	6	1P
NEBRASKA	4	T/P
NEW MEXICO	7	2P, 1T
NEW YORK, EASTERN	15	3P, 1T
NEW YORK, WESTERN	4	1T
OREGON	6	1P
SOUTH CAROLINA	10	1P
UTAH	5	1T
VIRGINIA, EASTERN	11	2P
WASHINGTON, WESTERN	7	1P

P = PERMANENT

T = TEMPORARY

T/P = TEMPORARY MADE PERMANENT

\* Includes judgeships authorized by P.L. 107-273, although the judgeships do not become effective until July 15, 2003.

## JUDICIAL CONFERENCE PROCESS FOR COURTS OF APPEALS

At its September 1996 meeting, on the recommendation of the Judicial Resources Committee, which consulted with the chief circuit judges, the Judicial Conference unanimously approved a new judgeship survey process for the courts of appeals. Because of the unique nature of each of the courts of appeals, the Conference process involves consideration of local circumstances that may have an impact on judgeship needs. In developing recommendations for courts of appeals, the Conference takes the following general approach:

A. Courts are asked to submit requests for additional judgeships provided that at least a majority of the active members of the court have approved submission of the request; no recommendations for additional judgeships are made without a request from a majority of the members of the court.

B. Each court requesting additional judgeships is asked to provide a complete justification for the request, including the potential impact on its own court and the district courts within the circuit of not getting the additional judgeships. In any instance in which a court's request cannot be supported through the standards noted below, the court is requested to provide supporting justification as to why the standard should not apply to its request.

C. The Conference considers various factors in evaluating judgeship requests, including a statistical guide based on a standard of 500 filings (with removal of reinstated cases) per panel and with pro se appeals weighted as one third of a case. This caseload level is used only as a guideline and not used to determine the number of additional judgeships to recommend. The Conference **does not** attempt to bring each court in line with this standard.

The process allows for discretion to consider any special circumstances applicable to specific courts and recognizes that court culture and court opinion are important ingredients in any process of evaluation. The opinion of a court as to the appropriate number of judgeships, especially the maximum number, plays a vital role in the evaluation process, and there is recognition of the need for flexibility to organize work in a manner which best suits the culture of the court and satisfies the needs of the region served.



## JUDICIAL CONFERENCE PROCESS FOR DISTRICT COURT REVIEWS

In an ongoing effort to control growth, in 1993, the Conference adopted new, more conservative criteria to evaluate requests for additional district judgeships, including an increase in the benchmark caseload standard from 400 to 430 weighted cases per judgeship. Although numerous factors are considered in looking at requests for additional judgeships, the primary factor for evaluating the need for additional district judgeships is the level of weighted filings. Specifically, the Conference uses a case weighting system<sup>1</sup> designed to measure judicial workload, along with a variety of other factors, to assess judgeship needs. The Conference reviews all available data on the caseload of the courts and supporting material provided by the individual courts and judicial councils of the circuits, and takes the following approach in developing recommendations for additional district judgeships:

A. A level of weighted filings in excess of 430 per judgeship is used as a starting point for considering requests; this caseload level is used only as a guideline and not used to determine the number of additional judgeships to recommend. The Conference **does not** attempt to bring each court in line with this standard.

B. The caseload of the individual courts is reviewed to determine if there are any factors present to create a temporary situation that would not provide justification for additional judgeships. Other factors are also considered that would make a court's situation unique and provide support either for or against a recommendation for additional judgeships.

C. The Conference reviews the requesting court's strategies for handling judicial workload, including a careful review of each court's use of senior judges, magistrate judges, and alternative dispute resolution, in addition to a review of each court's use of and willingness to use visiting judges. These factors are used in conjunction with the caseload information to decide if additional judgeships are appropriate, and to

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<sup>1</sup>"Weighted filings" is a mathematical adjustment of filings, based on the nature of cases and the expected amount of judge time required for disposition. For example, in the weighted filings system for district courts, each student loan civil case is counted as only 0.031 cases while each cocaine distribution defendant is counted as 2.27 weighted cases. The weighting factors were developed on the basis of time studies conducted by the Federal Judicial Center on cases filed between 1987 and 1991.

arrive at the number of additional judgeships to recommend for each court.

D. The Conference recommends temporary judgeships in all situations where the caseload level justifying additional judgeships occurred only in the most recent years, or when the addition of a judgeship would place a court's caseload close to the guideline of 430 weighted filings per judgeship. The Conference sometimes relaxes this approach in the case of a small court, where the addition of a judgeship would drop the caseload per judgeship substantially below the 430 level. In some instances the Conference also considers the pending caseload per judgeship as a factor supporting an additional temporary judgeship.

**ACTIONS TO MAXIMIZE USE OF JUDGESHIPS**

In addition to the conservative and systematic processes described in pages 1-5 for evaluating judgeship needs, given the current climate of fiscal constraint, the judiciary is continually looking for ways to work more efficiently without additional resources. As a part of the normal judgeship survey process or as a separate initiative, the judiciary has used a variety of approaches to maximize the use of resources and to ensure that resources are distributed in a manner consistent with workload. These efforts have allowed us to request fewer additional judgeships than the increases in caseload would suggest are required. Among the more significant methods in use are:

- (1) **Surveys to review requests for additional permanent and temporary judgeships and extensions or conversions of temporary judgeships to permanent:** As described previously, surveys are conducted biennially of all Article III judgeships needs. To reduce the number of additional judgeships requested from Congress, the Judicial Conference has adopted more conservative criteria for determining when to recommend creation of additional judgeships in the courts of appeals and district courts.
- (2) **Recommending temporary rather than permanent judgeships:** Temporary, rather than permanent, judgeships are recommended in those instances where the need for additional judgeships is demonstrated, but it is not clear that the need will exist permanently.
- (3) **Development of a process to recommend not filling vacancies:** In March 1997, the Judicial Conference approved a process for reviewing situations where it may be appropriate to recommend elimination of a district judgeship or that a vacancy not be filled. The Judicial Conference includes this process in its biennial surveys of judgeship needs for recommending to the Executive and Legislative Branches that specific vacancies be eliminated or not be filled. A similar process has been developed and is in use for the courts of appeals.
- (4) **Use of senior judges:** Judicial officer resource needs are also met through the use of Article III judges who retire from active service to senior status. Most senior Article III judges perform substantial judicial duties; over 375 senior judges are serving nationwide.

(5) **Shared judgeships:** Judgeship positions have been shared to meet the resource needs of more than one district without the cost of an additional judgeship.

(6) **Intercircuit and intracircuit assignment of judges:** To furnish short-term solutions to disparate judicial resource needs of districts within and between circuits, the judiciary uses intercircuit and intracircuit assignments of Article III judges. This program has the potential to provide short-term relief to understaffed courts.

(7) **Use of magistrate judges:** Magistrate judges serve as adjuncts to the district courts, supplementing the work of the Article III judges. Use of magistrate judges on many routine court matters and proceedings allows for more effective use of Article III judges on specialized court matters.

(8) **Use of alternative dispute resolution:** Since the late 1970s and with increasing frequency, courts use various alternative dispute resolution programs such as arbitration, mediation, and early neutral evaluation as a means of settling civil disputes without litigation.

(9) **Use of technology:** The judiciary continually explores ways to help align caseloads through technological advancements, where judges can assist other districts or circuits without the need to travel.

## CASELOAD CHANGES SINCE LAST JUDGESHIP BILL

With the creation of 34 additional district court judgeships, the total number of authorized district court judgeships has increased 5 percent since 1991; court of appeals judgeships have not increased. Since the last comprehensive judgeship bill was enacted for the U.S. courts of appeals and district courts, the numbers of cases filed in those courts have grown by 41 percent and 29 percent, respectively. Specific categories of cases have seen dramatic changes over the last 12 years, some increasing and some decreasing significantly. Following is a summary of the most significant changes.

**U.S. COURTS OF APPEALS**      (*Change in authorized judgeships: 0*)

- The total number of appeals filed has grown by more than 17,600 cases since 1991.
- Appeals of decisions in civil cases from the district courts have increased 25 percent.
- The most dramatic growth in civil appeals has been in prisoner appeals where case filings are up 63 percent since 1991; this growth has occurred in matters involving both state and federal prisoners.
- Appeals of criminal cases have risen moderately since 1991, increasing 13 percent overall.
- The number of appeals involving administrative agency decisions has fluctuated over the last several years, but is now more than three times the number filed in 1991, with most of that increase occurring in the past year. The increase in 2003 resulted from dramatic increases in the Ninth and Second Circuits in the number of appeals related to deportation orders.
- Original proceedings rose from 609 in 1991 to 3,659 in 2003. The Antiterrorism and Effective Death Penalty Act, enacted April 1996, requires prisoners to seek permission from courts of appeals for certain petitions. Data for these types of proceedings were not reported until October 1998. Between 1999 and 2003, original proceedings filings rose 8 percent.



are now 114 percent above the number of cases filed in 1991. The recent increases in social security filings have resulted from a change in the processing of backlogged cases by the Social Security Administration.

- Copyright, patent, and trademark cases filed rose every year between 1991 and 2000, with the exception of a small decline in 1995, increasing 68 percent in that time. Since 2000, filings have declined 4 percent due to a 16 percent drop in trademark cases.
- Most of the significant decreases in filings from 1991 to 2003 occurred in case categories that have a relatively small number of cases. The most significant exception is recovery of overpayments and enforcement of judgments cases. Recovery cases rose sharply between 1995 and 2000, but have since fallen sharply and are now approximately 7,000 cases below the number filed in 1991. Other significant decreases occurred in personal injury cases not related to product liability - down 3,700 filings, forfeiture and penalty filings - down 3,400 filings, and property foreclosures which fell 1,900 filings.

